UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ONEWEST BANK, N.A.,	(	
	(	
Plaintiff,	(	Civil Action No. 14-cv-5290
v.	(	
	(	(Gleeson, J.) (Pohorelsky, M.J.)
	(	
ROBERT W. MELINA; AMERICAN EXPRESS CENTURION BANK; AMERICAN EXPRESS BANK, FSB; CITIBANK, N.A.; WILLIAM R. SANTO; MAGALY BERMUDEZ; LOUIS BERMUDEZ; CARMEN MEDINA	(	
	(	
Defendants.	(	

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF"S MOTION FOR SUMMARY JUDGMENT

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In the Matter of ONEWEST BANK, FSB,
OTS Docket No. 18129, United States of America Before the
Office Of Thrift Supervision, Order No.: WN-11-011 (Effective April 13, 2011) 11,12, 13

Loan Sale Agreement By and Between The Federal Deposit Insurance
Corporation, as Receiver for IndyMac Federal Bank, FSB
and OneWest Bank, FSB. Dated March19, 2009. 2,7,8,9,10

Defendant ROBERT W. MELINA ("Defendant" or Melina") submits this memorandum of law in opposition to Plaintiff OneWest Bank, N.A.'s, formerly OnewestBank , FSB, ("Plaintiff" or "OneWest") motion, pursuant to Federal Rule of Civil Procedure 56, for summary judgment in its favor.

PRELIMINARY STATEMENT

In February 2007, Melina obtained a mortgage loan in the amount of $591,000 from Wall Street Mortgage Bankers LTD, A New York Corporation ("Wall Street"), for purchase of real property located at located at 1245 77th Street, Brooklyn, New York 11228. OneWest filed this action for foreclosure in September 2014 to recover over $583,452.48 in unpaid principal, plus interest and fees, it alleges are due to it on the mortgage loan.

As discussed in detail below, Plaintiff has not provided any factual details tending to show the note and mortgage was transferred to it by either a written assignment of physical delivery of prior to the commencement of the instant action. As such, Plaintiff has failed to establish standing to bring this action, and its motion for summary judgment should be denied. In addition, Plaintiffs failure to remedy its past bad acts is unconscionable and should be a bar to any recovery, including a grant of its motion for summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On February 26, 2007, Melina obtained a mortgage loan (the "Mortgage Loan") from Wall Street Mortgage LTD, a New York corporation in the amount of $591,000.Melina signed a note (the "Note") and a mortgage (the "Mortgage," together with the Note, the "Mortgage Loan"), securing the loan with the Property. The Note was transferred from Wall Street to

IndyMac Bank, F.S.B ("IndyMac").On March 19, 2009, OneWest entered into a Loan Sale Agreement(the "LSA") to purchase substantially all of the assets of IndyMac, with the Federal Deposit Insurance Corporation ("FDIC") as receiver.Plaintiff commenced this action by the filing of a Summons, Complaint, and Notice of Pendency on September 19, 2014,later amended by an amended complaint ("Amended Complaint") filed October 13, 2014. (Docket No. 11). At all relevant times, defendant was a citizen of New York, as alleged in Plaintiff's pleadings (Amended Complaint ¶ 3) and admitted by Defendant in its Answer to the Complaint filed on February 3, 2015, and later amended by the Amended Answer and Counterclaim ¶ 1 ("Amended Answer") filed on April 2, 2015.

Plaintiff alleges it is a National Association with its principal place of business in Pasadena, California (Amended Complaint ¶ 2, Affidavit of Jon Dickerson ¶ 2[1] ("Dickerson Aff."). Plaintiff further alleges jurisdiction based on diversity pursuant to 28 USC § 1332 (Amended Complaint ¶ 13). Finally, Plaintiff alleges standingto bring this action by virtue of physically possession of the note or, in the alternative, by written assignment (Dickerson Aff ¶ 9-11). On April 13, 2015, Plaintiff filed its answer to Defendant's counterclaim. (Docket No. 39.) Plaintiff filed its motion for summary judgment on May 8, 2015 (Docket #???).

ARGUMENT

POINT I

SUMMARY JUDGMENT STANDARD

[1]Affidavit of John Dickerson. Submitted by Plaintiff on May 8, 2015 (Docket #48)

Summary judgments may be granted "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a)."A fact is material if it might affect the outcome of the suit under the governing law, and an issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Ramos v. Baldor Specialty Foods, Inc., 687 F.3d 554, 558 (2d Cir. 2012) (citing Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist., 673 F.3d 84, 94 (2d Cir. 2012)). "On a motion for summary judgment, a fact is material if it might affect the outcome of the suit under the governing law." Crown Day Care LLC v. Dep't of Health and Mental Hygiene of City of New York, 746 F.3d 538, 544 (2d Cir. 2014) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)).

The Second Circuit has held that summary judgment is appropriate where admissible evidence is offered to show both the absence of a genuine issue of material fact, and that the moving party is entitlement to judgment as a matter of law. Major League Baseball Props., Inc. v. Salvino,Inc., 542 F.3d 290, 309 (2d Cir. 2008); see also Viola v. Philips Med. Sys. of N. Am., 42 F.3d 712, 716 (2d Cir. 1994). As to burden, "the moving party bears the burden of establishing the absence of any genuine issue of material fact." Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336, 340 (2d Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). If a movant meets its initial burden, the burden then shifts to the non-movant, who must "set forth specific facts indicating a genuine issue for trial exists." Cifarelli v. Vill.of Babylon, 93 F.3d 47, 51 (2d Cir. 1996). As to judgment as a matter of law, "the court must resolve all ambiguities and draw all justifiable factual inferences in favor of the party against whom summary judgment is sought."Major League Baseball Props.,

Inc. v. Salvino, Inc., 542 F.3d 290, 309 (2d Cir. N.Y. 2008) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

Plaintiff argues, in Point II of its memorandum in support, that it has established a *prima facie* entitlement to a judgment of foreclosure under New York law by claiming summary judgment was granted in Eastern Savs. Bank, FSB v. Evancie, No. 13-cv-00878 (ADS) (WDW), 2014 U.S. Dist. LEXIS 54317, 2014 WL 1515643, at *4(E.D.N.Y. Apr. 18, 2014), after the plaintiff in that case presented a note, a mortgage, and proof of default. To the extent Plaintiff relies on Evancie, its reliance is misplaced as plaintiff in that case obtained a default judgment, not summary judgment.

POINT II

PLAINTIFF HAS FAILED TO MAKE A *PRIMA FACIE* SHOWING OF STANDING

A. Standing To Bring A Foreclosure Action In New York Requires Plaintiff Prove Physically Delivery Of A Note Or Written Assignment Of A Note Prior to Commencing A Foreclosure Action

Defendant's Second Affirmative defense it that Plaintiff lacks standing to bring this action (Answer ¶ 5). A plaintiff establishes standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. Deutsche Bank Natl. Trust Co. v Rivas, 95 A.D.3d 1061, 1061-1062, 945 N.Y.S.2d 328, 329 (2d Dep't 2012); see also Bank of N.Y. v Silverberg, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532, 537 (2d Dep't 2011). However, where standing is put into issue by the defendant, "the plaintiff must prove its standing in order

to be entitled to relief." Deutsche Bank Nat. Trust Co. v Haller, 100 A.D.3d 680, 682, 954 N.Y.S.2d 551, 553 (2d Dep't 2012); see also U.S. Bank, N.A. v Collymore, 68 A.D.3d 752, 753, 890 N.Y.S.2d 578, 580 (2d Dept 2009).

A plaintiff has but two ways to prove that it the holder or assignee of the subject mortgage, as well as the underlying note; "either by physical delivery or execution of a written assignment prior to the commencement of the action." Deutsche Bank Nat'l Trust Co. v Rivas, 95 A.D.3d 1061, 1061-1062 (2d Dep't 2012); see also Aurora Loan Servs., LLC v Weisblum, 85 A.D.3d 95, 108, 923 N.Y.S.2d 609, 618 (2d Dep't 2011)); HSBC Bank USA v Hernandez, 92 A.D.3d 843, 844, 939 N.Y.S.2d 120, 121 (2d Dep't 2012). (U.S. Bank, N.A. v Collymore, 68 A.D.3d 752, 754, 890 N.Y.S. 2d 578, 580).(2d Dep't 2009).

Mere physical possession of a note is insufficient to confer holder status. In its memorandum of law, Plaintiff relies on N.Y. U.C.C. § 1-201(20) to state that party becomes the holder of a negotiable instrument by mere possession of said instrument. However, Plaintiff's reliance is misguided, as N.Y. U.C.C. § 3-202(1) provides that "[n]egotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable tobearer it is negotiated by delivery." Thus, no matter what form of note is negotiated, a party in possession of that note is only a holder when it can show physically delivery.

This exact argument was advanced by plaintiff Bank of N.Y. Mellon, with Hogan Lovells as counsel, and dismissed in the Supreme Court of New York, Kings County, where The Honorable Jack M. Battaglia, denying Plaintiffs motion for summary judgment, stated"[i]ndeed, the cursory treatment of the standing question in the memorandum of law evidences a

misunderstanding of the general law of negotiable instruments in its equation of the status as "holder" to mere possession of the instrument."Bank of N.Y. Mellon v. Deane, 41 Misc. 3d 494, 498-499, 970 N.Y.S.2d 427, 431, 2013 N.Y. Misc. LEXIS 2847, *7-8, 2013 NY Slip Op 23224, 4 (N.Y. Sup. Ct. 2013). This Court should afford Plaintiff no greater a sword than did the Kings County Supreme Court in Deane, and for the reasons set forth in parts B and C *infra*,deny Plaintiff's motion for summary judgment.

B. Plaintiff Has Failed To Demonstrate Physical DeliveryOf The Note Prior To Commencement Of The Instant Action.

Plaintiff's memorandum of law in support of its motion repeatedly alleges that is in physical possession of the Note, as does Dickerson Aff (¶ 6-9). It can only be presumed, then, that Plaintiff contends the Note is payable to bearer. However, Plaintiff has provided no factual details as to the actual physical delivery of the Note, as required by N.Y. U.C.C. § 3-202(1).In addition, The Appellate Division of the Second Department of the Supreme Court of New York has repeatedly denied summary judgment where the moving party failed to provide the exact date the note was transferred, or any details at all regarding the delivery of the note prior to commencement of a foreclosure action. Citimortgage, Inc. v Stosel, 89 A.D.3d 887, 934 N.Y.S.2d 182 (2d Dep't 2011) (reversing a grant of summary judgment since plaintiff "failed to establish how or when it became the lawful holder of the note either by delivery or valid assignment." Id. at 888); U.S. Bank, Natl. Assn. v Sharif, 89 A.D.3d 723, 933 N.Y.S.2d 293 (2d Dep't 2011) (reversing a grant of summary judgment because "the plaintiff submitted no evidence to establish physical delivery of the note" id. at 725); Homecomings Fin. v. Guldi, 108 A.D.3d 506, N.Y.S.2d 470 (2d Dep't 2013) (reversing summary judgment because the affidavit

"did not give factual details as to the physical delivery of the note and, thus, was insufficient to establish that the plaintiff had physical possession of the note at any time" Id at 509). HSBC Bank USA v. Hernandez, 92 A.D.3d 843, 939 N.Y.S.2d 120 (2d Dep't 2012) (upholding denial of summary judgment because plaintiff's affidavit "did not give any factual details of a physical delivery of the note" Id. at 844); Aurora Loan Servs., LLC v Weisblum, 85 A.D.3d 95, 923 N.Y.S.2d 609 (2d Dep't 2011)(reversing summary judgment on other grounds, but discussing standing "in light of the possibility that the action may be recommenced after [plaintiff] effects proper service." (Id. at 108) and holding the plaintiff failed to establish standing because the affidavit "failed to give any factual detail of a physical delivery of both the consolidated note and the CEMA to [plaintiff[prior to the commencement of the action." Id. at 109)).

Just as in Stosel, Sharif, Guldi, Hernandez, and Weisblum , Plaintiff in the instant action has failed to offer any evidence of when, or even that, physical deliver actually occurred. Plaintiff asserts, at paragraph 8 that on March, 19, 2009, the FDIC as Receiver of IndyMac Federal entered into a Loan Sale Agreement (the "LSA")[2] with OneWest, and that OneWest "acquired certain mortgage loans, including Defendant's Mortgage Loan." (Dickerson Aff ¶ 8)Plaintiff would like this Court to conclude that the date of the LSA, March 19, 2009, is the date of transfer. However, Section 2.05 of the LSA shows that delivery of the note is merely anticipated. Specifically, §2.05 reads:

> Closing. The closing of the sale provided for in the Agreement, herein referred to as the **"Closing,"** shall take place pursuant to the procedures

[2] Loan Sale Agreement By and Between The Federal Deposit Insurance Corporation, as Receiver for IndyMac Federal Bank, FSB and OneWest Bank, FSB. Dated March19, 2009.

Available on the website of the Federal Deposit Insurance Company at https://www.fdic.gov/about/freedom/IndyMacLoanSaleAgrmt.pdf

and subject to the conditions set forth in this Agreement and the Master Purchase Agreement

The word "shall" clearly shows that the delivery of notes subject to the LSA has yet to occur. In addition to the express language in the LSA, pooling and servicing agreements do not effectuate delivery of loan documents. "The statutes and cases require both a proper indorsement and physical delivery of the Note. Execution of the PSA does not satisfy either requirement. It merely demonstrates intent to indorse and physically deliver the notes and mortgages referred to."U.S. Bank N.A. v Bresler, 39 Misc. 3d 1205(A), 1205A, 971 N.Y.S.2d 75, 75, 2013 N.Y. Misc. LEXIS 1288, *14, 2013 NY Slip Op 50498(U), 6, 2013 WL 1339550 (N.Y. Sup. Ct. 2013)[3]

Thus, contrary to Plaintiff's argument in its memorandum of law, the affidavit of John Dickerson does not establish when,or even that, the note was actually physically delivered to Plaintiff prior to commencement of the instant action.

Moreover, Plaintiff alleges that, acting in its capacity as Plaintiff's document custodian, Deutsche Bank "had physical possession of the original indorsed Note and Mortgage from 2009 until April 21, 2011…."(Dickerson Aff ¶ 11).Not only is this statement inadmissible hearsay, but it is also a veiled attempt to manufacture an otherwise flawed chain of custody of the Note since Plaintiff has not submitted any evidence showing how, when, or even that, the Note was physically delivered to Deutsche Bank. In addition, since Mr. Dickerson is not an employee of Deutsche Bank, it follows that he necessarily lacks personal knowledge of if or when physical delivery of the Note to Deutsche Bank actually took place. Plaintiff has failed to submit any

[3] A copy of this unpublished decision is attached hereto in the addendum.

affidavits sworn to by any persons with actual knowledge of whether the Note was actually physical delivery, nor has anyone, including Deutsche Bank, affirmatively alleged *when*, or even that,the Note was actually received.

Thus, Defendant has raised questions of material fact as to when and whether delivery of the Note was actually made to Plaintiff prior to commencement of this action.

C. The Note In Plaintiff's Possession Lacks The Necessary Indorsement To Prove Assignment

Plaintiff alleges, as a separate basis for standing, in its memorandum of law, and in the Affidavit of John Dickerson, that it is the assignee of the Note and owner of the Mortgage by virtue of the express terms of the Loan Sale Agreement ("LSA"). (Dickerson Aff. ¶¶ 7-9).This, of course, would mean that the Note is payable to order, which is contrary to Plaintiff's earlier contention that it is payable to bearer. N.Y. U.C.C. § 3-202(1) states, in relevant part, that "[i]f the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable tobearer it is negotiated by delivery. To wit; the express terms of the LSA require all notes transferred under the LSA bear a specific form of endorsement, which Plaintiff's Note in this action lacks. Section 3.04 of the LSA reads:

> (b) The parties hereby agree that all Notes evidencing Loans shall be endorsed without recourse, and without representation or warranty by the Seller, express or implied, except (as to the Purchaser) as forth in this Agreement. The form of any endorsement of Notes or allonge to the Notes is as follows:
>
> Pay to the order of
> OneWest Bank, FSB
> Without Recourse

Federal Deposit Insurance Corporation as Receiver
forInyMac Federal Bank, FSB.
By:_____
Name:_____
Title: Attorney-in-Fact

The Note furnished by Plaintiff in the action at bar lacks this required endorsement. The reason why the FDIC refused to endorse this particular Note with the required endorsement is unclear, but raises a genuine issue of material fact as to whether Plaintiff was in fact assigned this particular Note pursuant to the LSA.

Regardless of whether the Note is payable to order or to bearer, N.Y. U.C.C. § 3-202(1) requires physical delivery. Since Plaintiff has not submitted any admissible evidence showing physical delivery prior to commencement of this action, and because the Note Plaintiff relies upon does not bear the endorsement required under the LSA, Plaintiff has failed to make a *prima facie* showing of standing and is not entitled to summary judgment of foreclosure.

POINT III

THE COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR THE ACTION AT BAR

Defendant's Third Affirmative Defense is that this Court lacks subject matter jurisdiction to hear this action. (Amended Answer ¶ 6).Asargued at length in Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12 (b) (1), filed with this Court via the Electronic Case Filing system on May 8, 2015(Docket No. 50), Plaintiff's principal place of business should be New York, New York. As such, Plaintiff and Defendant would both be citizens of New York and diversity of citizenship would be lacking.

POINT IV

PLAINTIFF'S HAS UNCLEAN HANDS

Defendant's Fourth Affirmative Defense is that Plaintiffs action is barred by the doctrine of unclean hands. (Amended Answer ¶ 7)."To charge a party with unclean hands, it must be shown that said party was Plaintiff in the instant action is 'guilty of immoral or unconscionable conduct directly related to the subject matter'"Citibank, N.A. v. Am. Banana Co., 50 A.D.3d 593, 856 N.Y.S.2d 600 (1st Dep't 2008).

On April 13, 2011, as part of an interagency review of residential mortgage servicers, the Office of Thrift Supervision ("OTS") released a Consent Order[4]("Consent Order") identifying deficiencies and unsafe or unsound practices in OneWest initiating and handling of foreclosure proceedings. OneWest, without admitting or denying any wrongdoing (Consent Order ¶ 3), stipulated to the release of the Consent Order and agreed to comply with the terms of said order. The OTS noted six (6) specific unsafe or unsound practices of OneWest Bank, FSB. Of particular relevance to the instant action was that OneWest:

> (c) litigated foreclosure and bankruptcy proceedings and initiated non-judicial foreclosure proceedings without always ensuring that the promissory note and mortgage document were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time. (Consent Order ¶ 2)

As part of the Consent Order, a Compliance Program was established and agreed to by OneWest.As part of the Compliance Program, the association was to, at a minimum, create:

[4]In the Matter of ONEWEST BANK, FSB, OTS Docket No. 18129, United States of America Before the Office Of Thrift Supervision, Order No.: WN-11-011 (Effective April 13, 2011)
Available from the website of the Office of the Comptroller of the Currency at
http://www.occ.gov/static/ots/misc-docs/consent-orders-97665.pdf

(e) processes to ensure that the Association has properly documented ownership of the promissory note and mortgage (or deed of trust) under applicable state law, or is otherwise a proper party to the action (as a result of agency or other similar status) at all stages of foreclosure and bankruptcy litigation, including appropriate transfer and delivery of endorsed notes and assigned mortgages or deeds of trust at the formation of a residential mortgage-backed security, and lawful and verifiable endorsement and successive assignment of the note and mortgage or deed of trust to reflect all changes of ownership. (Consent Order ¶ 11)

Despite promising to implement a program to **"**reflect **all** changes of ownership", Plaintiff in the action at bar has furnished a note, as discussed in POINT II, part C, above, that lacks the endorsement required pursuant to the Loan Sale Agreement. An agreement that Plaintiff itself relies on in asserting that it is the holder of the Note and Mortgage. (Dickerson Aff ¶ 6-9). Because Plaintiff Plaintiffs unconscionable conduct, which directly relates to the subject matter of this action, should be a bar to its recovery[5].

POINT V

PLAINTIFF'S ACTION IS BARRED BY THE EQUITABLE DOCTRINE OF LACHES

Defendant's Firth Affirmative Defense is that Plaintiffs action is barred by the doctrine of laches. (Amended Answer ¶ 8).Laches is not a mere matter of time, but principally a question of the inequity of permitting the claim to be enforcedCity of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 202, 125 S. Ct. 1478, 1482, 161 L. Ed. 2d 386, 386 (U.S. 2005).Laches and other equitable considerations are properly applied to remedies, not to the underlying claim itself. "The distinction between a claim or substantive right and a remedy is fundamental." (internalquotation

[5]Defendant is aware of ¶ 12 of the Consent Order, which states "Nothing in this Stipulation or the Order, express or implied, shall give to any person or entity, other than the parties hereto, and their successors hereunder, any benefit or any legal or equitable right, remedy or claim under this Stipulation or the Order." Defendant does not request relief *under* the Order, but instead uses to Order to establish that Plaintiff's bad acts in the instant action are nothing new.

omitted). Id. at 213.This Court should focus, like the Supreme Court did in Sherrill, on the appropriateness of the relief, and not on the nature of the underlying claim, in determining whether and what relief is available.

Plaintiff has furnished a note which that it cannot prove was physical delivered. As such, it would be an inequity for this Court to permit Plaintiff's claim to be enforced.

POINT VI

PLAINTIFF'S ACTION IS BARRED AS AGAINST PUBLIC POLICY

Defendant's Sixth Affirmative Defense is that Plaintiffs action is barred as against public policy. (Amended Answer ¶ 9). Plaintiff's action is barred as against public policy because Plaintiff has furnished a Note that is not in compliance with the Loan Sale Agreement between the United States Government and OneWest Bank and because of Plaintiff's blatant and continued disregarded for the Consent Order issued by the United States Office of Thrift Supervision ("OTS"). An Order in which Plaintiff assured the United States Government, as well its citizenry, that it would institute processes to ensure that accurate documentation ofthe ownership of promissory notes, as well as appropriate transfer and delivery of endorsed notes, and lawful and verifiable endorsement and successive assignments to reflect all changes of ownership. (Consent Order ¶ 11)

Requiring banking associations to comply with contracts entered into with the United States Government, especially in light of the significant decline in consumer confidence following the latest mortgage crisis, is a compelling social policy consideration. Allowing plaintiff in this action to benefit, despite its blatant disregard for the Loan Sale Agreement

between it and the Federal Deposit Insurance Corporation, as receiver for IndyMac Bank, would only serve to further erode public confidence in our government and elected officials, as well as a judiciary that would allow Plaintiff to benefit from its bad behavior.

POINT VII

COUNTERCLAIM OF ATTORNEYS' FEES AND/OR COSTS

Defendant's sole counterclaim is an award of attorneys' fees and/or expenses pursuant to New York's Real Property Law, Section 282 (Amended Answer ¶ 10), which provides, in pertinent part, that where a covenant contained in a mortgage on residential property allows the mortgagee to recover attorneys' and/or expenses if the mortgagor fails to perform, an implied covenant exists that allows the mortgagor to recover reasonable attorney's fees and or/expenses in the successfuldefense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract so long as the mortgagor seeks said fees and/or expenses "by way of counterclaim." N.Y. Real Prop.Law § 282(1). "Although Defendant is a prevailing mortgagor and therefore entitled to fees and costs under § 282, she has not made her request in a counterclaim as required by that section. The Court therefore denies Defendant's request for fees and costs in this action. Berkshire Bank v. Tedeschi, 2013 U.S. Dist. LEXIS 43214, *43, 2013 WL 1291851 (N.D.N.Y Mar. 27, 2013).

As discussed above, Plaintiff is not entitled to summary judgment in its favor, and is thus not entitled to strike Defendant's sole counterclaim.

CONCLUSION

For all the foregoing reasons, this Court should deny Plaintiff's motion for summary judgment.

Dated: New York, New York

May 22, 2015

Respectfully submitted,

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ADDENDUM

[*1]

U.S. Bank N.A. v Bresler

2013 NY Slip Op 50498(U) [39 Misc 3d 1205(A)]

Decided on April 3, 2013

Supreme Court, Kings County

Silber, J.

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 3, 2013

Supreme Court, Kings County

U.S. Bank National Association, AS TRUSTEE FOR SG MORTGAGE SECURITIES ASSET BACKED CERTIFICATES, SERIES 2006-FRE2, Plaintiff,

against

Alan Bresler, CCU LLC, MERS, INC. ET AL, Defendants.

33920/08

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Debra Silber, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for re-argument of the court's decision dated December 7, 2011 denying plaintiff's motion for summary judgment and the appointment of a Referee, and granting defendant's motion to dismiss, in this foreclosure action.

PapersNumbered

Notice of Motion, Affirmation, Exhibits Annexed and Memo.........*1-5,6*

Affirmation in Opposition and Exhibits Annexed..........................*7-8*

Reply..*9*

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff moves to reargue the denial of its motion for summary judgment and the appointment of a referee to compute, and the granting of defendant's motion to dismiss the action for lack of standing in this foreclosure action concerning 1477 East 32nd Street, Brooklyn, NY, 11234, Block 7694, Lot 85. It is noted that the court's order was never served by either party, so the timeliness of this motion is not an issue. Both sides have retained different counsel since the [*2]prior order was issued.

The court grants the motion to re-argue, and upon reargument adheres to its original decision.

On the original motion papers, the court found that the plaintiff had failed to make out a prima facie case for summary judgment, and that defendant had made out a prima facie case for dismissal on the grounds that plaintiff had not established it had standing to bring the action on the date the foreclosure action was commenced, which plaintiff did not overcome in its opposition papers. Plaintiff has failed to establish in this motion to reargue that the court either overlooked or misapprehended any matter of fact or law offered on the prior motion. CPLR 2221. It is noted that the plaintiff's motion primarily addresses the decision on defendant's motion, as the items plaintiff claims the court overlooked were not in plaintiff's motion, but were in plaintiff's opposition to defendant's motion, as is discussed in depth below.

Plaintiff claims the court erred in the Decision and Order dated December 7, 2011, in that the court "overlooked record evidence showing that the plaintiff was the assignee and holder of both the Note and the Mortgage". Plaintiff specifically states that this is not a motion to renew and that no new facts are contained in this motion.

In response to the plaintiff's original motion for summary judgment, defendant Alan Bresler, who had alleged in his Answer to the Complaint that the plaintiff lacked standing to bring this action, cross moved to dismiss the foreclosure action on the grounds that plaintiff lacked standing to bring the action. The court found that defendant was correct, and as such, the action was dismissed.

The mortgage in question was issued by Fremont Investment and Loan on May 4, 2006. The loan stated "for purposes of recording, MERS is the mortgagee of record." As the court previously noted, the tortured history of MERS is described in *Bank of NY v Silverberg, 86 AD3d 274* [2nd Dept], and need not be repeated. On December 18, 2008, an Assignment of Mortgage was executed, and subsequently recorded, which assigned the mortgage and not the note, from MERS to plaintiff.

In the December 7, 2011 Decision, the court found the assignment of a mortgage without the note was defective, as the transfer of the mortgage without the debt (Note) is a nullity. *Citimortgage, Inc. v Stosel*, 2011 NY Slip Op 8319 [2nd Dept] citing *U.S. Bank, N.A. v Collymore, 68 AD3d 752*, 754 [2nd Dept 2009]; *Bank of NY v Silverberg, 86 AD3d 274*, 280. The court also found that the assignment from MERS to plaintiff was defective, as MERS had no right or authority to assign the mortgage or the note herein. *Bank of NY v Silverberg, supra*. In addition, the Assignment was signed by Elpiniki M. Bechakas, an attorney in the office of Stephen J. Baum PC, now defunct, a firm whose attorneys routinely and improperly signed mortgage assignments claiming to be officers of MERS. This practice was barred by the settlement agreement the firm signed with the U.S. Attorney's Office for the Southern District in October of 2011.[FN1]

As is noted in the New York Law Journal ("Baum Firm Reaches Settlement With Attorney General" 3/22/2012), in addition to the October of 2011 settlement with the US [*3]Attorney for the Southern District of New York wherein it agreed to pay a $2 million dollar fine and revamp its practices, the Baum firm reached a settlement with the New York State Attorney General pursuant to which it was required to pay $4 million. The article further notes that the firm subsequently closed its doors.

Plaintiff maintained in the original motion that the mortgage was properly transferred, asserting that MERS had the authority to execute the written assignment of the mortgage as the mortgagee of record. This argument was determined to be unavailing.

Of note, at oral argument of this motion to reargue, plaintiff admitted that MERS did not have authority to assign the Note (Transcript of Oral Argument p 14, line 19) when it assigned the mortgage in 2008 and admitted that the assignment of the mortgage cannot effectuate the assignment of the note (p. 9), but claimed the Note was transferred "Through the PSA and through a transfer of physical possession" which conferred standing on plaintiff from that point in time. This argument was not part of plaintiff's original motion for summary judgment, and it is not proper to move to reargue on a different basis and legal theory than that argued in the original motion. *DeSoignies v Cornasek House Tenants' Corp., 21 AD3d 715* (1st Dept 2005); *Frisenda v X Large Enters.*, 280 AD2d 514 (2nd Dept 2001). Thus, this admission by counsel constitutes an acknowledgment that the plaintiff's original motion for summary judgment did not make out a prima facie case for the relief requested.

Plaintiff now claims the court misapprehended the law, and that the note was properly transferred to plaintiff by "special indorsement." Therefore, plaintiff argues, as holder of the note, plaintiff had standing. Plaintiff argues that regardless of whether the assignment of the mortgage was invalid, they had actual possession of the note. Plaintiff maintains that production of the note along with the affidavit saying they had physical possession of it on the date of commencement of the action is prima facie evidence that they had possession of the note and therefore standing, and that there is no evidence to the contrary. However, the "special indorsement," or "allonge" was not included in the original motion, nor was any statement about it in any affidavit included in the original motion papers.

A mortgage can be assigned in two ways - by the delivery of the bond (note) and mortgage by the assignor to the assignee with the intention that all ownership interest be thereby transferred or by a written instrument of assignment. *Deutsche Bank Trust Co. Ams. v Peabody*, 20 Misc 3d 1108[A] [Sup Ct, Saratoga County 2008]. Thus, "[e]ither a written assignment of the underlying note or the physical delivery of the note . . . is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident." *U.S. Bank, N.A. v Collymore, 68 AD3d 752*, 754; *Weaver Hardware Co. v Solomovitz*, 235 NY 321, 331-332 [1923]; *Payne v Wilson*, 74 NY 348, 354-355 [1878]; *LaSalle Bank Natl. Assn. v Ahearn, 59 AD3d 911*, 912, [3rd Dept 2009]; *Mortgage Elec. Registration Sys., Inc. v Coakley, 41 AD3d 674* [2nd Dept 2007]; *Flyer v Sullivan*, 284 App Div 697, 699 [1954]. However, the fact remains that plaintiff has proven neither assignment of, nor physical delivery of, the note before the commencement of the action.

To be clear, no allonge/indorsement of the Note was included in plaintiff's original motion papers, so the court did not misapprehend the facts. The affidavit of Jaime Walls in the original motion does not mention the transfer of possession of the Note *or* the allonge/indorsement. She relies on the assignment of mortgage which counsel now agrees is [*4]insufficient. Thus, on the original motion papers, plaintiff failed to make out a prima facie case for summary judgment. Defendant made out a prima facie case for dismissal, which plaintiff's opposition failed to overcome.

The indorsement plaintiff now points to was provided solely as an exhibit to the Jones Affidavit included in plaintiff's opposition to defendant's cross-motion. Additionally, plaintiff's sole evidence of this alleged indorsement is a photocopy of a document Ms. Jones claims is an assignment of the Note, which is merely a blank piece of paper, allegedly appended to the original note, which states "Pay to the order of US Bank National Association as Trustee, without recourse," and is undated and signed by "Michael Koch, Vice President, Fremont Investment and Loan." At oral argument, the court asked to see the original, and counsel did not have it. Nor did counsel offer to provide it, stating "It's in the vault." Transcript page16 line 22.

In this motion, plaintiff has included a photocopy of an affidavit of Jessica Jones, Vice President for Loan Documentation for Wells Fargo Bank N.A. Counsel for plaintiff states on page nine of the transcript that "The Jones affidavit and the annexed exhibits were all part of the [original] summary judgment papers." However, Ms. Jones' affidavit of November 1, 2011 was *not* included in plaintiff's motion for summary judgment, but was in plaintiff's opposition to defendant's cross-motion to dismiss. Plaintiff's counsel urges the court to give great weight to Ms. Jones' affidavit, "as the sworn testimony by the custodian" that "they have physical possession of the original note."

Ms. Jones states "the loan was transferred" in July 2006, whatever that means, but as to the note, it only says "the Note was endorsed and was physically delivered to Wells Fargo/ASC as servicing agent and custodian for US Bank prior to the commencement of this action. Thus, Wells Fargo's records specifically reflect that it was in physical possession of the endorsed Note prior to the commencement of this action." Ms. Jones provides no date of the alleged delivery of the Note. This is not specific enough.

The court notes that this matter is further complicated by the fact that after the mortgage closed in 2006 and prior to the commencement of the action in 2008, the FDIC issued a Cease and Desist Order against the lender, Fremont Investment and Loan.[FN2] There was also litigation in several states brought by their Attorneys General against Fremont. Plaintiff now avers that "the loan" had already been transferred to the Trust (for which plaintiff serves as trustee) in 2006 pursuant to the PSA, so that any restrictions Fremont may have been under as a result of the Order were not relevant. In making this argument, plaintiff now avers that the MERS assignment in 2008 "merely memorialized the transfer of the mortgage and note which took place in 2006." The court finds that the plaintiff has not met its burden of proof in this regard, and further that this was not the gist of the original motion which plaintiff seeks to reargue. Many of the lender's assets were sold to Capital Source Bank in June of 2008 with the consent of the FDIC, after its Cease and Desist Order against Fremont in March 2007. Further, Fremont filed for Bankruptcy protection in 2008 in the USDC, Central District of California.

It is particularly troubling that Ms. Jones' affidavit is only dated on the signature page, by [*5]the notary, and her signature is on a page separate and apart from the aforesaid affidavit, while the preceding page is blank on its lower half. The submission of a photocopy of an affidavit in a case where the allonge was not affixed to the Note, which has a signature page that doesn't follow the end of the affidavit is innately suspicious and raises a question of whether the signer read the affidavit. Here, the clear inference is that she did not read it. Thus, the court cannot give it any weight.

There is also no question that the alleged indorsement herein is on a separate page from the Note and is clearly undated. See, *Indy Mac Bank, F.S.B. v Garcia*, 28 Misc 3d 1202(A) [Sup Ct Suffolk Co. 2010]. New York UCC § 3-202 (1) states, in pertinent part, that "[i]f the instrument is payable to order it is negotiated *by delivery* with any necessary indorsement" (emphasis added). In addition, UCC § 3-202 (2) requires that "[a]n indorsement must be written by or on behalf of the holder and *on the instrument or on a paper so firmly affixed thereto as to become a part thereof* (emphasis added). Here, the purported indorsement is payable to plaintiff's order, but on a separate page.

In the Official Comment to UCC § 3-202(2) (McKinney's) it states "Subsection (2) follows decisions holding that a purported indorsement on a mortgage or other separate paper pinned or clipped to an instrument is not sufficient for negotiation. The indorsement must be on the instrument itself or on a paper intended for the purpose which is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge."

Although the court could not find any New York appellate cases addressing this issue, numerous trial courts throughout the Second Department have ruled that, a note secured by a mortgage is a negotiable instrument, and a transfer requires an indorsement on the instrument itself or on a paper so firmly affixed thereto as to become a part thereof, as per UCC § 3-202(2), in order to effectuate a valid assignment of the instrument. See, *Deutsche Bank National Trust Company v Hossain,* 2013 NY Slip Op 30096 (U) [Sup Ct Suffolk Co 2013]; *Deutsche Bank Trust Company Americas v Thanhauser,* 2013 NY Slip Op 30565 (U) [Sup Ct Suffolk Co 2013]; *HSBC Bank USA v Picarelli,* 36 Misc 3d 1218 (A) [Sup Ct, Queens Co 2012]; *Deutsche Bank National Trust Company v Vasquez,* 2012 NY Slip Op 31395 (U) [Sup Ct Nassau Co 2012]; *HSBC Bank USA, National Association v Hagerman,* 2011 NY Slip Op 33344(U) [Sup Ct, Richmond Co]; *HSBC Bank USA, National Association v Coyo,* 934 NYS2d 792 [Sup Ct, Kings Co 2011]; *The Citi Group/Consumer Finance, Inc. v Platt,* 33 Misc 3d 1231 (A) [Sup Ct Queens Co 2011]; *IndyMac Bank, FSB v Garcia,* 28 Misc 3d 1202 (A) [Sup Ct Suffolk Co 2010]; *HSBC Bank USA, National Association v Miller, 26 Misc 3d 407* [Sup Ct Sullivan Co 2009]; *LaSalle Bank National Association v Lamy,* 12 Misc 3d 1191 (A) [Sup Ct Suffolk Co 2006].

At oral argument on January 10, 2013, plaintiff's counsel insisted that the Note was delivered to plaintiff in July of 2006, concurrent with the Pooling and Servicing Agreement (PSA), and represented that said agreement was in the original motion papers. However, counsel then admitted that the Exhibits to the Agreement were omitted, both in the original motion and in this motion, so there is no way to reference this mortgage in said Agreement. When asked, counsel told the court the PSA is "a matter of public record because they are on file with the Securities and Exchange Commission" (transcript of 1/10/13, p 8). The court declines his [*6]invitation to look for it and see if it references this mortgage. It is also noted that while counsel claimed the delivery was made in July of 2006, there is no statement to that effect in the plaintiff's original motion papers from anyone with knowledge of the facts. Further, delivery was made to Wells Fargo as servicer, according plaintiff's counsel, who indicated Wells Fargo is also the "custodian for the Trust" (transcript of 1/10/13, p 3), so in his opinion, plaintiff Trustee did not have to be the recipient of the delivery, as delivery to plaintiff's agent was sufficient. For purposes of the decision, the court accepts that as true and correct.

The problem is that the execution of the PSA does not effectuate a transfer of the Note as contemplated by the applicable statutes and case decisions. The statutes and cases require *both* a proper indorsement *and* physical delivery of the Note. Execution of the PSA does not satisfy either requirement. It merely demonstrates intent to indorse and physically deliver the notes and mortgages referred to.

Paragraph 2.01, referenced by plaintiff, states, in relevant part:

"the Depositor [SG Mortgage securities, LLC], does hereby deliver . . . with respect to each Mortgage Loan so transferred and assigned . . . theoriginal Mortgage Note, endorsed either (A) in blank, in which case the Trustee *shall* cause the endorsement to be completed or (B) in the following form: "Pay to the order of U.S. Bank National Association, as Trustee, without Recourse" [emphasis added].

The quoted text makes it quite clear that delivery is anticipated, but it implicitly also makes it clear that delivery is yet to be accomplished.

Plaintiff's counsel asserted at oral argument that there are two case decisions which the court should rely on, as they were correctly decided. One of these cases, *Hudson City Savings Bank v Roger Lanoue* (Sup Ct NY Co. 2012; Index No. 107305/09) is a trial court decision in a different Judicial Department, and is not binding on the court. However, the court must note that in the *Lanoue* case the plaintiff demonstrated that it was in possession of both the assigned note and mortgage at the time it commenced the action. This is not the case in the instant matter. The other case, *US Bank v Carlos Guzman* (Sup Ct Queens Co 2012; Index #4451/09) is also from a court of concurrent jurisdiction in the Second Department and also is not binding on this court. It is not reported either. However, the court notes this decision involves a similar PSA to that in the instant case, and not the same agreement. As such, it is possible that the language contained in the PSA in the *Guzman* case concerning the transfer of the notes might be different; which may be inferred from the decision's language.

There is no evidence of delivery of the Note prior to this action's commencement, other than the Jones affidavit, which is conclusory and does not say when the Note was delivered. As discussed above, it also is of limited weight.

Thus, the so-called "indorsement" is, at best, something prepared in compliance with the PSA and subsequent thereto, and fails to support plaintiff's claim that the Note and Mortgage were transferred to plaintiff by a properly indorsed Note prior to the commencement of this action. See, *Deutsche Bank Nat. Trust Co. v Haller*, 2012 NY Slip Op 7619 [2d Dept 2012]; *Deutsche Bank Nat'l Trust Co. v Barnett, 88 AD3d 636* [2nd Dept 2011]; *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208 [2d Dept 1989]; *Indy Mac Bank, F.S.B. v Garcia*, 28 Misc 3d 1202(A).

In conclusion, while the Jones affidavit avers that the original note was timely in the [*7]possession of the plaintiff, the affidavit does not state any factual details concerning when the plaintiff or its agents received physical possession of the note and, thus, does not establish that the plaintiff had physical possession of the note prior to commencing this action. See, *Deutsche Bank Nat'l Trust Co. v Barnett, 88 AD3d 636*; *Aurora Loan Servs LLC v Weisblum, 85 AD3d 95*,108 [2nd Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; *HSBC Bank USA v Hernandez, 92 AD3d 843*, 844. Further, plaintiff has not proven that a valid transfer of the note was made to the plaintiff by an indorsement thereon as required by the UCC, or that plaintiff had physical possession thereof prior to commencing this action. See, *Deutsche Bank Nat. Trust Co. v Haller*, 2012 NY Slip Op 7619; *HSBC Bank USA v Hernandez*, *supra; Deutsche Bank Nat. Trust Co. v Barnett*, 88 AD3d 636. Moreover, plaintiff's original motion papers make no mention of the indorsement whatsoever.

Without either proof of a proper written assignment of the underlying note or proof of the physical delivery of the note prior to the commencement of the foreclosure action, the plaintiff failed to sufficiently show either the proper transfer of the obligation, or that the mortgage passed as an inseparable incident to the debt. See, *U.S. Bank, N.A. v Collymore, 68 AD3d 752*; *Indy Mac Bank, F.S.B. v Garcia*, 28 Misc 3d 1202(A).

Therefore, upon reargument, the court adheres to its original decision.

This shall constitute the Decision and Order of the Court.

Dated: April 3, 2013

E N T E R:

Hon. Debra Silber A.J.S.C.

Footnotes

Footnote 1: *http://www.justice.gov/usao/nys/pressreleases/October11/stevenbaumpcagreementpr.pdf*

Footnote 2: http://www.fdic.gov/bank/individual/enforcement/2007-03-00.pdf

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